

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

VALASSIS NSA)	Docket No. MC2012-14
)	
VALASSIS NSA)	Docket No. R2012-8

**VALPAK DIRECT MARKETING SYSTEMS, INC. AND
VALPAK DEALERS' ASSOCIATION, INC.
INITIAL COMMENTS
(May 23, 2012)**

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Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. (hereinafter "Valpak") hereby file their Initial Comments Opposing the Commission's approval of the Proposed Market Dominant Negotiated Service Agreement ("NSA") between the U.S. Postal Service and Valassis Direct Mail, Inc. ("Valassis").

Valpak has carefully evaluated, and has filed briefs and comments on, most prior domestic market dominant NSAs, including the following documents:

Docket No. MC2002-2	Capital One NSA	Initial Brief	April 3, 2003
"	"	Reply Brief	April 14, 2003
Docket No. MC2004-3	Bank One Corp.	Comments	Sept. 27, 2004
Docket No. MC2004-4	Discover	Initial Brief	Sept. 8, 2004
"	"	Reply Brief	Sept. 15, 2004
Docket No. MC2007-1	Bank of America	Initial Brief	Aug. 2, 2007
"	"	Reply Brief	Aug. 13, 2007

In addition, Valpak submitted two filings in Docket No. RM2003-5, [Comments](#) on Rules Applicable to Baseline and Functionally Equivalent NSA's, filed September 29, 2003, and [Reply Comments](#), filed October 14, 2003.

Further, since enactment of the Postal Accountability and Enhancement Act (“PAEA”), Valpak addressed Market Dominant NSAs in its Initial Comments on the Postal Service’s Annual Compliance Report in the following dockets:

- Docket No. ACR2007 (January 30, 2008), [Valpak Initial Comments](#), pp. 25-26,
- Docket No. ACR2008 (January 30, 2009), [Valpak Initial Comments](#), pp. 40-43,
- Docket No. ACR2009 (February 1, 2010), [Valpak Initial Comments](#), pp. 65-73, and
- Docket No. ACR2011 (February 3, 2012), [Valpak Initial Comments](#), pp. 39-40.

COURSE OF PROCEEDINGS

On April 30, 2012, the Postal Service filed its Notice of “Filing of Contract and Supporting Data and Request to Add Valassis” NSA “to the Market Dominant Product List.” On May 3, 2012, the Commission issued Order No. 1330, commencing proceedings in two dockets reflecting the two-fold nature of the Postal Service’s request: establishing a new special classification under 39 U.S.C. section 3642 (Docket No. MC2012-24), and establishing a new product with distinct prices under 39 U.S.C. section 3622(c)(10) (Docket No. R2012-8). Initial Comments were required to be filed by May 23, 2012, and Reply Comments by May 30, 2012. There were three Chairman’s Information Requests (“ChIR”):

- On May 9, 2012, the Chairman issued ChIR No. 1, *sua sponte*. The [Postal Service response](#) was filed on May 16, 2012.
- On May 10, 2012, Newspaper Association of America (“NAA”) requested the Commission to ask the Postal Service to produce additional information. On May 11, 2012, the Chairman issued ChIR No. 2, incorporating most of the NAA questions. The [Postal Service response](#) was filed on May 18, 2012.
- On May 14, 2012, Valpak requested the Commission to ask the Postal Service to produce additional information.¹ On May 15, 2012, the Chairman issued

¹ The requests by Valpak and NAA were made pursuant to Rule 3001.21(a), asking the Commission to issue an Information Request seeking additional clarifying data and

ChIR No. 3, incorporating most of the Valpak questions. The [Postal Service response](#) was filed on May 21, 2012.

ARGUMENT

I. This NSA Is Improperly Before the Commission, as It Was Filed Pursuant to an Invalid Delegation by the Governors.

Three days prior to filing its notice of the recent Discover Financial Services NSA, the Governors adopted a resolution on January 11, 2011, stating that “[p]ursuant to section 404(b) and Chapter 36 of Title 39, United States Code, the Governors establish price and classification changes for market dominant products [and establish] a negotiated service agreement with Discover Financial Services” The resolution also specified the date price changes would be effective.²

Yet in this docket, the Governors neither authorized the Postal Service to enter into the specific NSA agreement, nor approved the specific prices that would be charged under this NSA, nor established the effective date on which revised prices would be changed. Rather, well in advance of this docket, the Governors purported to delegate their authority to the Postmaster General, or his staff (specifically naming the Chief Financial Officer), empowering Postal Service management to use their discretionary judgment to make whatever filing with the Commission they choose to make in order to establish whatever market dominant NSA they

explanation from the Postal Service regarding the proposed NSA.

² Docket No. MC2011-19, Notice of the U.S. Postal Service, Attachment A (Jan. 14, 2011), <http://www.prc.gov/Docs/71/71587/Not.USPS.DFSNSA.pdf>.

want to create as a new product, including specifying an effective date of their selection. *See* Governors Resolution No. 11-4 (Mar. 22, 2011), Attachment A to the NSA.

A. The Governors Are Not Permitted to Delegate any Authority Specifically Vested in Them by PAEA.

Resolution 11-4, upon which the NSA in this docket is predicated, is a Resolution of the Governors of the United States Postal Service. Although the resolution purports to be an exercise of the powers vested in the Governors by section 404(b) and Chapter 36 of Title 39 of the United States Code, it neither “establishes reasonable and equitable classes of mail,” nor “reasonable and equitable rates of postage and fees for postal services,” as authorized by that section and chapter of PAEA. Instead, Resolution 11-4 delegates the Governors’ authority to “management” to establish such classes and rates through NSAs “with Postal Service customers” in conformity with relevant statutes and regulations, reserving to the Governors only oversight and revisory authority based upon (a) quarterly reports required of management by the resolution, and (b) other information submissions otherwise required of management by postal regulations.

According to 39 U.S.C. section 402, however, “the powers, duties, or obligations **specifically vested in the Governors**” (emphasis added), as is the case with those powers vested by section 404(b), are nondelegable. This strict rule against delegation contrasts starkly with the discretionary authority vested by section 402 in the **Board of Governors**, wherein the Board is authorized “to delegate the authority vested in **it** to the Postmaster General under such terms, conditions, and limitations ... as **it** deems desirable.” 39 U.S.C. § 402 (emphasis added).

The power vested by section 404(b), and purportedly exercised by the Governors in Resolution 11-4, “to establish reasonable and equitable classes of mail and reasonable and equitable rates of postage and fees for postal services in accordance with the provisions of Chapter 36,” is “specifically vested in the Governors,” and thus, the Governors cannot delegate to the Postmaster General, or postal management, the Chief Financial Officer, the power “to establish reasonable and equitable classes of mail and reasonable and equitable rates of postage and fees for postal services.”

B. The Nondelegation Rule is of Significant Importance Here.

Good reason exists for this bar against delegation. The nine Governors, as contrasted with the other two members of the Board of Governors, are appointed by the President and confirmed by the U.S. Senate. 39 U.S.C. § 202(a)(1). In contrast, the other two members of the Board, the Postmaster General and the Deputy Postmaster General, are appointed by the Governors. 39 U.S.C. § 202(c)-(d). Not more than five of the nine Governors may be “adherents of the same political party,” to the end that the “Governors shall represent the public interest generally.” *See* 39 U.S.C. § 202(a). Additionally, to ensure that the public interest be paramount, the Governors must be “chosen solely on the basis of their experience in the field of public service, law, accounting or on their demonstrated ability in managing organizations or corporations ... of substantial size; except that at least 4 of the Governors shall be chosen solely on the basis of their demonstrated” managerial ability. *Id.* In short, “[t]he Governors shall not be representatives of **specific interests** using the Postal Service.” *Id.* (emphasis added).

Resolution 11-4 departs from this public interest principle. Instead of the Governors examining and approving each specific NSA, the pricing task is delegated to the Chief Financial Officer. As able as he may be, the Chief Financial Officer is only one person, and theoretically is more vulnerable to the special interests of particular large users of the Postal Service. In contrast, the Governors are intended by specific selection criteria to exercise collective business judgment in the public interest, lest particular postal customers obtain, by means of an NSA, postal services at prices that are inconsistent with the “best practices of honest, efficient, and economical management, to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States.” *See* 39 U.S.C. section 404(b). For these reasons, the Postal Service’s request was void when filed, and this NSA should be returned forthwith to the Postal Service, subject to refiling should the Governors at some later time specifically approve entering into an NSA with Valassis.

II. The NSA was Legally Insufficient When Filed, and the Postal Service Has Not Been Responsive to Numerous Chairman’s Information Requests.

Since its filing with the Commission seeks both (i) to modify the Market Dominant Product List, and (ii) to approve a Negotiated Service Agreement, the Postal Service must comply with both sets of corresponding Commission regulations. The Postal Service purports to respond to these two sets of requirements with the Statement of Supporting Justification, Attachment E to its filing:

This statement supports the Postal Service’s request by providing the information required by each applicable subsection of **39 C.F.R. section 3020.32**. In addition, this statement provides the

information required by **39 C.F.R. section 3010.42(b)-(e)**.
[Postal Service Filing, Attachment E (emphasis added).]

Attachment E is arranged in terms of responses to the subsections of 39 C.F.R. section 3010.32. Most of Attachment E is a lengthy quotation of the factors and objectives set out in 39 U.S.C. section 3622, but only in a perfunctory manner. It analyzes the NSA in terms of 39 C.F.R. section 3020.32 in only a few paragraphs. Although Attachment E claims to demonstrate compliance with 39 C.F.R. section 3010.42, it contains **not one word** analyzing the NSA in response to the requirements of section 3010.42.

A. Rules Relating to Modification of Product List.

Commission regulations describe the process by which proposals to modify the market dominant product list are to be proposed. *See* 39 C.F.R. §§ 3020.30, *et seq.* The Postal Service filing fell short in this area.

1. **39 C.F.R. section 3020.32(a)** provides that the request: “Demonstrate why the change is in accordance with the **policies** and the applicable **criteria** of chapter 36 of title 39 of the United States Code....” (Emphasis added.)

Attachment E simply asserts that “the change complies with the applicable statutory provisions,” referring to the remainder of Attachment E for the justification.

2. **39 C.F.R. section 3020.32(b)** provides that the request “Explain why ... the change is not inconsistent with each **requirement** of 39 U.S.C. section 3622(d) and that it advances the **objectives** of 39 U.S.C. section 3622(b), taking into account the **factors** of 39 U.S.C. section 3622(c)....” (Emphasis added.)

Attachment E states only that the NSA demonstrates pricing flexibility and an opportunity to enhance Postal Service finances.

3. **39 C.F.R. section 3020.32(f)** requires that the Postal Service “Provide a description of the availability and nature of **enterprises in the private sector** engaged in the **delivery** of the product....” (Emphasis added.)

Attachment E simply says that the NSA would result in increased mail volume at reduced rates using a special classification.

4. **39 C.F.R. section 3020.32(h)** requires that the Postal Service “Provide a description of the likely impact of the proposed modification on **small business** concerns....” (Emphasis added.)

Attachment E only addresses those small businesses which sell alternate delivery service, and represents that the Postal Service has no information to offer about any adverse effect on them, but “expects” no substantial effect. That representation is highly speculative. *See* discussion in Section IV.B.1, *infra*.

B. Rules Relating to Negotiated Service Agreements.

Commission regulations also describe the standard which NSAs must meet, and mandate the filing of significant information. *See* 39 C.F.R. §§ 3010.40, *et seq.* The Postal Service filing falls short in several particulars.

1. **39 C.F.R. section 3010.42(c)** requires that the Postal Service filing include “Details regarding the expected improvements in the net financial position or operations of the Postal Service. The projection of change in **net financial position** as a result of the agreement shall

include for each year of the agreement: ... (3) An analysis of the **effects** of the negotiated service agreement on the contribution to institutional costs from **mailers not a party** to the agreement....” (Emphasis added.)

ChIR No. 1, Question 2 addresses this shortcoming, asking for a response to the requirement of the rule. Without admitting that this information was missing from its initial filing, the Postal Service concludes, without meaningful analysis, that “it is unlikely that the NSA will harm any other mailer.” This response is wholly inadequate.

Interestingly, the Commission previously explained the basis for the rule requiring information about the effect of revenue loss from non-parties when it rejected the argument of Advo (now Valassis) that the Commission could focus on gross contribution and could disregard lost contribution from other mailers in the rulemaking implementing PAEA’s pricing and classification changes:

NAA correctly explains why rule 3010.42(d)(3) allows computation of the net financial position of the Postal Service resulting from implementation of a negotiated services agreement.

Advo [now Valassis] and Time Warner overlook that when the Postal Service chooses to rely on the ‘increasing the overall contribution to the institutional costs of the Postal Service’ alternative in (A)(i), **the analysis necessarily must include an evaluation of lost contribution from non-parties to an NSA.** This is because subsection (A)(i) refers to improving the **net financial position** of the Postal Service by increasing the *overall* institutional cost contribution. Ignoring the effect on contribution from other mailers would limit consideration to merely the **gross effect** from the NSA mailer and ignore the net impact on the Postal Service. [Docket No. RM 2007-1, Order

No. 43, p. 60 (Oct. 29, 2007) (*italics original*)
(emphasis added).]

In this docket, the Postal Service appears to have fully embraced Valassis' 2007 position which was rejected by the Commission. The Postal Service failed to provide the information that the Commission determined was essential, and that the Commission expressly requested. Based on the information provided, the Commission simply cannot know the "net financial position" of the Postal Service as a result of the Valassis NSA, and therefore should not approve the NSA.

2. **39 C.F.R. section 3010.42(c)** also requires that "(4) If **mailer-specific costs** are not available, the source and derivation of the costs that are used shall be provided, together with a discussion of the currency and reliability of those costs and their suitability as a proxy for the mailer-specific costs." (Emphasis added.)

ChIR No. 1, Question 2 asked the Postal Service for the place where it provided mailer-specific costs. Of course, no mailer-specific costs were provided. Alternatively, the Postal Service was asked to explain why other costs used are reliable. The Postal Service, again not admitting that its original filing was deficient, finally addressed the issue in its response. After setting the bar quite low, the response concludes that the Postal Service "is not aware of reasons to conclude that costs at the expected weights will exceed revenues."

See Postal Service response to ChIR No. 1, Q. 2.

3. **39 C.F.R. section 3010.42(e)** requires “Details regarding any and all actions (performed or to be performed) to assure that the agreement will not result in unreasonable harm to the **marketplace**.” (Emphasis added.)

This requirement was not met in the Postal Service’s initial filing, and was not addressed in subsequent questions. *See* discussion in section IV.B.1.

C. Shifting Requirements for NSAs.

It is difficult to discern from the Postal Service filing what mail qualifies for this NSA, as the eligibility criteria keep shifting. In the NSA, it is required that “mailpieces ... must [have] a minimum dimension of at least25" [in thickness], and must contain a minimum of 3 advertising inserts ...” Notice, p. 5. No minimum weight is expressly required, but pricing of rebates could be read to imply a minimum weight of 4 ounces. *See* Notice, p. 5.

When asked about the basis for the 1/4 inch thickness requirement, the Postal Service stated that “[a]s a **practical** matter, this specification is subsumed within the other required physical attributes of the eligible mailpieces, including the three advertising insert minimum and the four-ounce weight threshold.” These requirements are “**expected** to result in all qualifying pieces meeting or exceeding 1/4 inch thickness.” Response to ChIR No 3, Question 2 (May 21, 2012) (emphasis added). During the brief period between filing of the Notice on April 30, and filing of its response to ChIR No. 3 on May 21, the fixed, legal minimum requirement, below-which-mail-would-not-qualify thickness requirement has transmogrified into a “practical” test which is “expected” to fall out of other standards. With such shifting sands, it would appear impossible for the Commission to trust the Postal Service’s description as to what mail qualifies for the rebate. The reason for these subtle shifts

in minimum standards is unknown, but it could be a lack of concern as to accuracy, or deliberate vagueness so that the Postal Service can retain total discretion to declare whatever mail it wants to be eligible, or ineligible, for the discount.

Similarly, when the Postal Service responded to ChIR No 3, Question 7, it made clear that any mailing which had even one non-qualifying piece would not be eligible for the rebate. *See also* response to ChIR No. 2, Question 4a. But when the Postal Service responded to ChIR No. 2, Question 3, it stated that inclusion of ineligible advertising only “**could jeopardize** eligibility for rebates on the mailing.” *Id.* (emphasis added). No regulator could approve an NSA which sits on such shifting sands.

D. Chairman’s Information Requests Concerning Mail Processing Were Not Answered.

ChIR No. 3, Question 3(c) and (d) asked the Postal Service whether the new Valassis mailings would be handled as third bundles (or “extra” bundles, since carriers receiving mail processed on an FSS already have 3 bundles), and what the excess capacity of the Postal Service would be to handle such third bundles. The Postal Service declined to provide meaningful answers, simply saying that operational issues were handled locally. If the Postal Service cannot answer how the mail under the Valassis NSA will be delivered, and whether it has the capacity to handle the mail as a low-cost separate bundle, the cost estimates are flawed and the NSA should be rejected for that reason alone. In fact, the Postal Service had already responded that no pieces would be handled on FSS equipment. *See* response to ChIR No. 3, Question 2a. It, likewise, should have answered the Chairman’s third-bundle questions. Its decision not to do so is unacceptable.

E. Other Matters Not Addressed.

Nowhere in the Postal Service's filings has it represented that it asked Valassis to assure the Postal Service that it was not already (i) contemplating introducing mailings from national retailers of durable and semi-durable goods, and (ii) intending to move beyond its one-mailing-per-week model. Perhaps this was based on commitments (or less formal indications) received from "anchor" national retail advertisers, thereby rendering all volume under the program "anyhow" volume, for which Valassis would receive deeply discounted rates. It is not clear that such a question was even asked.

III. NSAs Have Escaped Meaningful After-the-Fact Commission Review.**A. Annual Compliance Reviews Have Not Been Effective against Unprofitable NSAs.**

Given the relatively short duration of most NSAs, their noncompliance with PAEA appears to "evade review." Yet the problem presented by noncompliant NSAs has been demonstrated to be clearly "capable of repetition." Annual Compliance Determinations under PAEA have demonstrated one central fact about NSAs: three of the five years have seen net losses to the Postal Service, with a cumulative net loss over all five years of an astounding \$23.4 million. To date, NSAs have proven themselves a complete failure. Moreover, the annual compliance review process has not been up to the task of preventing harm from ill-advised NSAs after they were approved and implemented.

1. Bradford Group NSA

The Commission's FY 2010 ACD commented on the Bradford Group NSA losses during the contract year ending in FY 2010, after having made a net contribution to the Postal Service in FY 2009 of \$93,000:

Thus, the Postal Service lost nearly \$72 thousand in contribution in the second year of the Bradford Group NSA.... 39 U.S.C. 3622(c)(10) requires that special classifications improve the net financial position of the Postal Service.... The Bradford Group NSA is estimated to have had a **negative effect on the net financial position** of the Postal Service in FY 2010. However, the **first two years** of the agreement **combined** have resulted in an increased contribution to the Postal Service.... For these reasons, the Commission finds the two market dominant NSAs in effect in FY 2010 **consistent** with title 39. [FY 2010 ACD, pp. 135-36 (emphasis added).]

In effect, the Commission decided to disregard noncompliance for the second year of that NSA because its first-year profits covered those second-year losses.

Although section 3622(c)(10) is silent as to whether net contribution be evaluated **cumulatively** or **annually**, sections 3652 and 3653 require annual compliance reporting by the Postal Service followed by an annual compliance determination by the Commission. NSAs that lose money in any year would appear to fail to increase contribution for that year, and should therefore be deemed noncompliant.

The standard of an **annual** finding of compliance was established by the Commission in Docket No. ACR2011. There, in the third and final contract year for the Bradford Group NSA, the Postal Service lost another \$37,000, putting that NSA permanently in the red. The Commission stated, "The Bradford Group NSA is estimated to have had a minor negative effect on the net financial position of the Postal Service in FY 2011. The 3-year agreement

with the Bradford Group, as a whole, also had a minor negative effect on the finances of the Postal Service.” FY 2011 ACD, p. 152. Although the third-year loss was only about half the size of the second-year loss (which the Commission had found to be in compliance), the Commission found noncompliance:

The Commission find the Bradford Group market dominant NSA was **not consistent** with 39 U.S.C. 3622(c)(10) in FY 2011. However, as the agreement has concluded, there is **no need for remedial action**. [*Id.* (emphasis added).]

2. Bank of America NSA

In the FY 2009 ACD, the Commission found that the Postal Service lost \$25 million³ over the course of a year and a half of the Bank of America NSA. Although the initial contract term was three years, the contract was terminated by the parties after one and a half years. Sufficient harm had already been done. The Commission concluded, “However, since the Postal Service has exercised its right to cancel the agreement, no further action is necessary.” FY 2009 ACD, p. 114. Again, there was no Commission finding of violation of the Act, and no accountability by the Postal Service.

B. Approval of the Discover NSA Lacked Adequate Foundation.

As discussed *supra*, among the standards for NSAs is the requirement that it either increase the net financial position of the Postal Service or enhance performance of Postal Service operations. The Discover NSA approved by the Commission last year in Order No. 694 was predicated on improving the net financial position of the Postal Service. The Postal

³ This amount did not include the costs of litigating and settling the Capital One complaint case (Docket No. C2008-3).

Service estimated that the NSA would increase contribution between \$2.4 million and \$14.9 million over the three-year term.

The Commission expressed “reservations about the methods used by the Postal Service to estimate what DFS’s volumes would be in the absence of the agreement,” and employed several tests to evaluate the NSA. The first test was its established test from Docket No. MC2004-3, but that “analysis indicates that the agreement is unlikely to increase the net contribution to the Postal Service.” Order No. 694, pp. 13-14. The Commission then used the Public Representative’s test, which did show an increase in the net financial position. However, the Commission could not endorse this approach since it relied on the Postal Service’s volume projections. *Id.*, pp. 14-15.

The Commission ultimately found that it would remedy the lack of a “quantitative model for measuring estimated volumes absent the agreement” by “requiring the Postal Service to collect certain data. In the meantime, the Commission finds that allowing this negotiated service agreement to proceed will allow management to enhance its knowledge of potential tools to slow the overall declining trend for First-Class Mail volume.” *Id.*, p. 15. “Given the totality of the circumstances presented, the Commission finds that agreement may proceed pursuant to section 3622(c)(10).” *Id.*, p. 16.

Unfortunately, by the time the Commission and the public are able: (i) to determine whether the “totality of the circumstances” actually demonstrated compliance with the requirements of section 3622(c)(10)(A)(i), and (ii) to evaluate the success of the first contract year of the Discover NSA in the FY 2012 annual compliance review, the parties will be in the

latter half of the second contract year. Although we hope the Discover NSA has much success, it remains to be seen how the Commission would address losses, if any are incurred.

C. The Commission Needs to Evaluate Carefully the Valassis NSA in Advance.

There are a number of reasons that the Postal Service's estimates of the benefit of the Valassis NSA might be suspect, including whether it has adequately considered lost revenue from other mailers not a party to the NSA. If the Valassis NSA were to be approved on the information which the Commission now has, and then proceeds to lose money like many NSAs before it, the current annual compliance review procedures may not be up to the task. The Commission cannot escape the possibility that the Valassis NSA could go awry, as many others have. The Postal Service admits that even in the absence of this NSA, saturation mail volume has been migrating to private delivery. *See* section V.D, *infra*. If such migration accelerates, as a result of this NSA, the Commission needs to have a way to identify and measure those losses. Accordingly, the Commission must do a thorough review/evaluation of this proposed NSA now, and refuse to approve a faulty concept.⁴

IV. The Valassis NSA Is Not in Compliance with the Requirements of Title 39.

As discussed in Section I, *supra*, this NSA must be evaluated in accordance with the requirements of both 39 U.S.C. § 3642(b)(3) and 39 U.S.C. § 3622(c)(10).

⁴ The Commission's rules contemplate that pre-implementation findings of compliance "are provisional and subject to subsequent review." 39 C.F.R. § 3010.44(c).

A. The Valassis NSA is inconsistent with the standards for protection of small business concerns in the private sector set out in 39 U.S.C. § 3642(b)(3).

In adding a new product to the market dominant product list, the Commission is required first to determine whether the product is, in fact, market dominant, and then consider other specific factors:

Additional considerations. — In making any decision under this section, **due regard** shall be given to —

(A) the availability and nature of **enterprises in the private sector** engaged in the delivery of the product involved;

(B) the views of those who use the product involved on the appropriateness of the proposed action; and

(C) the likely impact of the proposed action on **small business concerns** (within the meaning of section 3641(h)). [39 U.S.C. § 3642(b)(3) (emphasis added).]

The Commission rules require the Postal Service to provide information to assist the Commission in performing evaluation, giving “due regard” to these three considerations. *See* 39 C.F.R. § 3020.32(f)-(h). The Postal Service represented that it was doing so in Attachment E to its Notice, but failed to provide meaningful information.⁵ The Commission is certainly not in a position to evaluate the Valassis NSA as to the effect on small business concerns based on the cursory information filed with the Notice. *See* section II.E.4, *supra*.

Indeed, the only small business concerns the Postal Service addresses in Attachment E are those small businesses which sell alternate delivery service. The Postal Service represents that it has no information to offer about any adverse effect on such alternate delivery, but “expects” no substantial effect. That representation is highly suspect. For example, an

⁵ Additional brief information concerning competition from private delivery was provided in response to ChIR No. 3, Question 5.

alternative delivery service which finds that its anchor delivery piece is being pulled, so that it can be mailed at deeply-discounted prices not made available to all mailers, might be put out of business by this NSA — an effect perhaps not “substantial” to the Postal Service, but obviously quite substantial to the company.

To obtain a more complete response to the effect of the Valassis NSA on small businesses, ChIR No. 3, Question 4 was submitted to the Postal Service and the Postal Service has now represented that no other types of small businesses would be adversely impacted. This response also is highly suspect. The small business concerns which compete with the national retail chains advertising in the Valassis wrap would appear to be highly disadvantaged by not having access to saturation mail at deeply discounted rates. The Postal Service dismisses these concerns cavalierly, saying “The Postal Service does not control the prices Valassis would charge to its advertisers. Small businesses across the nation already have options to join shared mail programs.” *Id.* But these other shared mail programs are not available at deeply discounted postage rates which permit lower ad pricing. The Postal Service’s central plan is designed to give low cost options to the largest retail chains in America, to the competitive disadvantage of small businesses. Having been ignored by the Postal Service, this statutory small business factor must be given serious consideration by the Commission. This NSA should be rejected based on the adverse effect on small businesses alone. This requirement is related to the issue of undue discrimination, discussed in section IV.B.1, *infra*.

B. The Valassis NSA does not meet the tests set out in 39 U.S.C. § 3622(c)(10).

Although 39 U.S.C. § 3622 describes the Commission’s establishment of a “modern system for regulating rates and classes for market-dominant products,” subsection (c)(10) establishes the requirements by which Negotiated Service Agreements are to be evaluated:

(10) the desirability of special classifications for both postal users and the Postal Service in accordance with the **policies of this title**, including agreements between the Postal Service and postal users, **when available on public and reasonable terms to similarly situated mailers**, that —

(A) either —

(i) improve the net financial position of the Postal Service through [a] reducing Postal Service costs or [b] increasing the **overall contribution to the institutional costs** of the Postal Service; or

(ii) enhance the performance of mail preparation, processing, transportation, or other functions; and

(B) do not cause **unreasonable harm** to the marketplace.

[Emphasis added.]

Distilled, according to subsection (c)(10), there are four essential requirements that an NSA must satisfy:

1. that it be made “available on public and reasonable terms to similarly situated mailers”;
2. that it be “in accordance with the policies of ... title [39]”;
3. that it either (a) improve the Postal Service’s net financial position or (b) enhance the Postal Service’s operations; and
4. that it “not cause unreasonable harm to the marketplace.”

Requirements 1 through 3 were recognized expressly by the Commission and reflected in its rules implementing PAEA’s ratemaking provisions. The fourth requirement was said to be subsumed by the requirement that the Postal Service may file whatever other information it believes to be helpful. *See* 39 C.F.R. § 3010.40. Each of these requirements is discussed below.

1. **The NSA is not “in accordance with the policies” of Title 39 in that it violates the prohibition against unlawful discrimination/preferences under 39 U.S.C. section 403(c), and may “cause unreasonable harm to the marketplace.”**

The first requirement of section 3622(c)(10) is that NSAs and other special classifications be “in accordance with the **policies of ... title [39]**.” This requires that the Commission ensure that an NSA meet all the applicable policies of Title 39, including section 403(c) which states:

In providing services and in establishing classifications, rates, and fees under this title, the Postal Service shall not, except as specifically authorized in this title, make any **undue or unreasonable discrimination** among users of the mails, nor shall it grant any **undue or unreasonable preferences** to any such user. [Emphasis added.]

However, the Postal Service has already virtually admitted that the Valassis NSA will not be offered to any other mailer. *See* section IV.B.2, *infra*.

Section 403(c) prohibits undue or unreasonable discrimination among the various users of mail. The Postal Service explained that it “understands from Valassis that national durable and semi-durable goods advertising retailers indicate that these new shared saturation mail programs would provide them an affordable service alternative....” Notice, Attachment E, p. 4.

Because no other mailer will qualify for similar discounts, any national retailer of durable goods desiring to use saturation mail essentially will be forced to advertise with Valassis because this NSA will make Valassis the least expensive option for shared mail. This constitutes undue preferential treatment of Valassis by the Postal Service.

As to causing “unreasonable harm to the marketplace,” if the experience which the nation has gone through since the government’s intervention in the economy to mitigate the effect of the recession has taught us anything, it is that the American people are tired of the Government picking winners and losers. They want companies to be allowed to compete on a level playing field, and especially do not want the Government to offer special deals and subsidies to the biggest firms in the country, causing the big to grow bigger. The natural instinct of a Government monopoly is to give special privileges to the big and wealthy firms, but that instinct to grant special privileges based on “bigness” must be resisted. Protection of the integrity of the marketplace is one of the reasons that protections for small businesses are written into the law by Congress, and must be taken seriously by the Commission.

2. This NSA never will be made available on “reasonable terms to similarly situated mailers.”

The requirement that NSAs be made available to similarly situated mailers was established by the Commission prior to the enactment of PAEA. PAEA codified this important principle by requiring that the Postal Service make NSAs “available on public and reasonable terms to similarly situated mailers.”⁶ 39 U.S.C. § 3622(c)(10). As discussed in Section II, *supra*, the Postal Service apparently believes that the power to enter into NSAs with similarly

⁶ Although the legal phrase “similarly situated” is not defined in Title 39, it has come into common use in various contexts. “In addition to equal protection analysis, the phrase ‘similarly situated’ appears in cases involving tax law, the Clean Water Act, the commerce clause, shareholder actions, class action certification, social security, employment discrimination, standing, antitrust, and bills of attainder [and criminal law].” G. Shay, “Similarly Situated,” 18 GEO. MASON L. REV. 581, 584-586 (2011) (footnotes omitted).

situated mailers is one within its unfettered discretion; but the very opposite is true — when triggered, it is a matter of a similarly situated mailer’s unqualified right.

If NSAs must be offered to similarly situated mailers, it becomes incumbent on the Commission to consider this issue during approval of an NSA. Although the Commission correctly determined that normally the final decision on whether a mailer is similarly situated will be made in the context of a subsequent complaint docket, the Commission emphasized that “not providing [an] opportunity” for similarly situated mailers to have “a similar opportunity to participate in a functionally equivalent Negotiated Services Agreement” would “raise the possibility of discrimination.” *See* Docket No. MC2011-19, Order No. 694, p. 20 (March 15, 2011). This is exactly the situation presented by this NSA. The Postal Service has set the bar for this NSA so high as to ensure that there will be no similarly situated mailers to have a “similar opportunity to participate.”

The Postal Service could have stood silent and declined to give its view as to which mailers would be considered similarly situated. Indeed, it later claimed that there was no standard being proposed for similarly situated mailers:

The Valassis NSA is a specific contract with a particular mailer. Neither the contract itself nor the Postal Service’s Notice were intended to interpret “similarly situated” for any hypothetical purpose.... The terms of the Valassis NSA outline circumstances and conditions that both the Postal Service and Valassis have agreed would result in pricing incentives that would be beneficial to both parties. [Response to ChIR No. 3, Q. 1.]

However, the Postal Service has ventured out into those difficult waters, and it is too late to retreat. The Postal Service’s notice describes what it considers “mailer eligibility” under the Valassis NSA: “A mailer under this NSA must be a Standard Mail Saturation Flat mailer who

has demonstrated capability to provide a broad multi-market shared mail program, as evidenced by shared mail volumes of at least 400 million pieces annually mailed to 50 percent of existing SCF areas.” Notice, p. 4. The Postal Service then concludes that Valassis met these NSA criteria because “[i]n each of the last two fiscal years, Valassis mailed more than 3 billion pieces of Standard Mail Saturation Flats in shared mail programs with a regular frequency of at least monthly, covering more than 60 million households weekly in 88 discrete market areas in 37 states.” One would have thought that the Valassis NSA came first, and the definition of a similarly situated mailer would have fallen out of the nature of Valassis, but the Postal Services reverses the natural order. It establishes a hypothetical volume and coverage standard and then, presto, declares that Valassis met that arbitrary standard. (What a surprise it would have been if Valassis did not meet the standard established!)

Then, in response to ChIR No. 2, Question 1, the Postal Service admitted that no other mailers meet its arbitrary standard:

A Negotiated Service Agreement (NSA) is **specific by customer**. This NSA is aimed at providing a right-priced saturation shared mail program for national durable and semi-durable goods retail advertisers that are not currently using the mail for their general-distribution advertising.... Based on existing Postal Service data, **no other mailers** that have shared mail program volumes of 400 million pieces annually mailed to 50 percent of existing SCF areas **are currently identified**. However, to the extent that other mailers can demonstrate the same abilities to quickly satisfy the needs of those targeted advertisers, the USPS would be willing to discuss a similar NSA. [Emphasis added.]

If no other mailers can meet the arbitrary standard it set, there could be no functionally equivalent NSAs. This is prima facie evidence that this NSA is unduly discriminatory. *See* Commission Order No. 694, p. 20.

Indeed, since the Postal Service established this standard knowing no other mailer would qualify, it appears designed to create only an illusion of fairness. The Postal Service would know it would never face a Capital One Services-type complaint (Docket No. C2008-3) predicated on the Bank of America NSA.

As the Postal Service has proposed the Valassis NSA, designed so it could never be made available to similarly-situated mailers, is inherently discriminatory, violates 39 U.S.C. section 3622(c)(10), and should not be approved.

3. **Since the Commission has declined to inquire about the costs of the Valassis NSA, it is impossible to know with certainty whether the Valassis NSA will increase contribution to institutional costs in all circumstances.**

The Postal Service asserts that the Valassis NSA qualifies under subsection (c)(10)(A)(i)[b] in that the agreement improves the net financial position of the Postal Service by increasing overall contribution to institutional costs. Based on financial projections in Attachment F to the Notice, this would seem likely. However, based on the Commission's experience with NSAs, the lesson should have been learned that it is impossible to know precisely how bad the financial effect of a Postal Service-negotiated NSA can be.

For example, in the case of the Bank of America NSA, in its Annual Compliance Determination for FY2009, the Commission reported that:

The agreement did not result in the reduction of operational costs as projected by the Postal Service.... The Postal Service also invested **\$13 million in administrative costs** to implement the agreement for which there is **no salvage value**.... The net financial effect of the Bank of America deal in contract year one was a loss of \$23.5 million for the Postal Service. [Annual Compliance Determination, Docket No. ACR2009, pp. 113-14 (March 29, 2010).]

For this reason, in this docket Valpak requested the Commission to ask the following question:

Will the Valassis NSA cause the Postal Service to incur any **new initial or one-time costs, such as new equipment** (*e.g.*, computer hardware, mail processing equipment, etc.) or software programming? If so, please specify the nature and approximate amount of such costs, and whether they will be reported separately to the Commission as costs attributable to the Valassis NSA. [Docket No. MC2012-14, Valpak Motion for Issuance of Information Request, Question No. 2 (May 14, 2012).]

The Chairman declined to pose this question to the Postal Service. Accordingly, it is not possible for the Commission to know if there will be significant “administrative costs,” albeit different from those which drove the incredible losses suffered by the Postal Service in the Bank of America⁷ NSA. For this reason, it is impossible for the Commission to conclude that the Valassis NSA will increase contribution, as asserted by the Postal Service.

V. The Valassis NSA Is an Unhelpful Diversion from the Need to Employ Proper Product Pricing to Become Financially Self-Sustaining.

The Postal Service’s principal objective should be to restructure itself in a manner that will allow it to become a financially self-sustaining entity. A self-sustaining Postal Service also is an underlying goal of legislation currently being considered by Congress.⁸ To help achieve that estimable end, the Postal Service already has announced a number of excellent and

⁷ The Bank of America is the second largest bank holding company in the United States by assets. http://online.wsj.com/article/SB10001424052970204479504576638653920110530.html?mod=WSJ_hp_MIDDLETopStories.

⁸ No legislation introduced to date has proposed returning the Postal Service to the status of a government agency. Most telling, moreover, is that no legislative proposal would appropriate taxpayer money, even small amounts, to help support any part of the Postal Service (including those small, uneconomic post offices that create so much political angst). This means, of course, that financial self-sufficiency must be regarded a matter of paramount importance.

important cost-reducing initiatives. However, the Postal Service cannot expect to succeed if those responsible for pricing decisions are allowed to drill holes in the bottom of the boat faster than those cost cutters in Operations can bail. At least as much as all prior NSAs, and probably more, the Valassis NSA indicates that the Postal Service has lost its way, and may not be able to survive in a competitive business environment. This section of our comments seeks to remind the Postal Service of the obvious, in hopes that it will begin to think in a businesslike manner about pricing before it is simply too late.⁹

A. Systemwide Coverage Requirements are Substantial.

For the most recently concluded fiscal year, FY 2011, the CRA reported costs and revenues as shown in Table 1, below. The systemwide coverage over total attributable costs was **171.6 percent**. A systemwide coverage of that amount would have enabled the Postal Service to achieve financial breakeven.

At the same time, revenues fell short of costs by \$5.06 billion, as shown at the bottom of Table 1. It is widely understood that the Postal Service's costs need to be reduced by at least that amount. If the Postal Service had been able to reduce its other (non-attributable) costs by this amount, then hypothetically it would have needed a coverage of only **159.4 percent** to achieve financial breakeven.¹⁰

⁹ See Docket No. ACR2011, Valpak Initial Comments, pp. 24-26, discussing the Postal Service's belief that it does not need a pricing strategy.

¹⁰ This lower coverage figure is based on the assumption that all cost reduction by the Postal Service would be achieved by eliminating costs not now considered attributable. If the Postal Service instead somehow managed to increase its efficiency via some reductions in attributable costs, along with reductions in fixed costs, a higher coverage over the reduced attributable cost base would be necessary to cover other non-attributable costs.

Table 1

U. S. Postal Service Costs and Revenues
FY 2011
(Millions)

Attributable Costs:	
Market Dominant Services, including special services	\$34,571.8
Competitive Services	<u>6,680.0</u>
Total attributable costs	41,251.8
All other costs	<u>29,443.8</u>
Total Costs	<u>70,805.6</u>
Total Revenues	\$65,739.0
Shortfall, Revenues less Costs	\$ 5,066.6

Source: Cost and Revenue Analysis Report, FY 2011

B. The Postal Service Needs a Pricing Strategy Designed to Support Financial Solvency.

The decline in the volume of First-Class Mail with its historically high cost coverage, the resulting fiscal deficits, and the need to become financially self-sustaining create a new environment in which the Postal Service needs to re-think its pricing strategy for all products. The two coverage figures of 159.4 and 171.6 percent, discussed in Section V.A, *supra*, coupled with the goal of a financially self-sustaining Postal Service, provide a **business-like framework** and meaningful benchmarks against which all postal products, including NSAs generally, and the Valassis NSA in this docket, should be usefully assessed. Succinctly, using the above systemwide coverage figures as benchmarks, the extent to which existing or

proposed products facilitate or hinder the goal of a financially self-sustaining Postal Service is as follows.

**1. Institutionally self-sustaining:
Products with a coverage greater than 172 percent.**

Products in this category will help sustain the Postal Service within its present cost structure, and even more so if restructuring enables major cost reductions. Any reduction in the volume of these products can be highly detrimental to the Postal Service's financial health, as diminished volume in First-Class Mail already has demonstrated. In a sense, products in this category represent the lifeblood of the Postal Service. Hence, the Postal Service needs to give these products maximum support and nourishment. Toward that end, the Postal Service should consider using its pricing flexibility to reduce the price and coverage of these key products, especially where elasticity is high, such as saturation mail.

**2. Marginally institutionally self-sustaining:
Products with a coverage greater than 160 percent but less than 172 percent.**

From the viewpoint of long-term financial self-sustainability, products in this category contribute an amount sufficient to help sustain the Postal Service indefinitely — but only if it is able to reduce costs by \$5.1 billion. All market-dominant NSAs, including the Valassis NSA under review in this docket, should be designed to achieve at least this level of coverage.

**3. Helpful, but not institutionally self-sustaining:
Products with a coverage less than 160 percent but greater than 100 percent.**

Any product in this category covers its attributable costs and makes some contribution, however small, to the Postal Service's fixed costs. What needs to be recognized, however, is

that products in this category **would not** enable the Postal Service to survive as a financially independent institution **even if** it reduces costs by the \$5.1 billion shortfall in Table 1. It is only the more profitable products, in categories 1 and 2, that will enable the Postal Service to be financially sustainable over the long term.

The Commission is reminded often by mailers that use underwater products and barely above-water products that any price increase on any product can be expected to result in some loss of volume for that product. Regardless of whatever loss in volume might be anticipated, the Postal Service's price adjustments need to focus on increasing the coverage of all products in this category — especially the low-profit products — as it is far better to risk a reduction in the volume of low-profit products in this category than lose volume of high-profit products in categories 1 and 2.¹¹

**4. Money losers and institutional death spiral:
Products with a coverage of less than 100 percent.**

Obviously, products in this category individually and collectively constitute a major drag on Postal Service financial stability, and even survival.

The direct losses which these products sustain is bad enough. However there is a secondary, perhaps less obvious, negative effect that cannot be overlooked. That is, in order to sustain losses incurred on underwater products, the price cap forces the Postal Service to maintain higher-than-necessary coverage on its more profitable products, especially those in

¹¹ Lower volume will reduce attributable costs. A significant loss of volume in low-profit products might enable the Postal Service to restructure further and also reduce some fixed overhead (*i.e.*, incremental) costs associated with such products. This possibility means that any reduction in the volume of such low-profit products need not be all that damaging to the bottom line.

category 1 above. The double-whammy of (i) direct losses from these underwater products and (ii) indirect losses from volume losses caused by charging higher rates on most profitable mail could easily trigger the feared death spiral for the Postal Service.¹²

C. The Valassis NSA Seeks to Segment the Market for Distribution of Hard Copy Advertising Material.

The Valassis NSA contains a number of restrictions designed to assure that no mail volume in any of its **existing** products will benefit from the significant price reductions (20 percent or more) for it is only “**new**” saturation shared mail volume for which the NSA provides. As the Postal Service states in its response to ChIR No. 3, Question 6a, “The purpose [of those restrictions] is to **segment the market** by usage and needs.” (Emphasis added.) That response further states that:

Saturation shared mail has been a reasonably attractive distribution channel for non-durable goods businesses, such as grocery and drug stores, fast food and restaurants, and service businesses. However, for many **national durable and semi-durable** goods retailers that have a need to reach a general audience on a regular and frequent basis, the **distribution cost at current postal prices** is an **impediment** to their usage of the mail. [Emphasis added.]

The Postal Service makes no attempt to explain why current postal prices constitute no impediment to (i) **consumable goods retailers** such as grocery and drug stores, fast food and restaurants, and service businesses, and (ii) **non-national durable and semi-durable goods**

¹² Sadly, the Postal Service has thrown in its lot with money-losing products like Standard Flats, and appears to have decided that it will sink or swim with those products. *See, e.g.*, Postal Service Petition for Review of Commission finding of non-compliance in Docket No. ACR2010. This strategy reasonably could be viewed as self-destructive and potentially suicidal.

retailers, but do represent a profound and urgent impediment to usage of shared saturation mail by (iii) **national durable and semi-durable goods retailers**. (*See* section V.D., *infra*, for further discussion of the pricing issue.)

There is little indication that the Postal Service has conducted (or had access to) meaningful data concerning current advertising practices by national retail providers of durable and semi-durable goods. To what extent do such retailers currently rely on electronic advertising (*e.g.*, TV, internet, search engines)? To what extent do they use hard copy? Is current hard-copy advertising restricted to magazines and run-of-print newspaper advertising? Are national retail providers of durable and semi-durable goods currently known to distribute heavy-weight (5 oz. or more) advertising circulars via private delivery? Before going after new markets, a well-run business customarily conducts market research, but the Postal Service gives no indication that it has conducted meaningful research, or is privy to research conducted by others (*e.g.*, Valassis). A question never asked is a question never answered, which causes one to wonder whether the Postal Service has in its possession, or has presented to the Commission, all pertinent information regarding this NSA.

D. Coverage on Saturation Mail is Too High, and Is Encouraging Migration of Existing Saturation Mail Volume to Private Delivery.

In the last four years, since Standard Mail High Density/Saturation Letters and HD/Saturation Flats were defined as products under PAEA, coverage of those saturation products has consistently exceeded 200 percent.¹³

¹³ By way of contrast, in FY 2007, coverage on ECR mail was 189.50 percent. *See* FY 2007 CRA.

Coverage

Year	HD/Saturation Letters %	HD/Saturation Flats & Parcels %
2008	229.08	255.61
2009	214.35	238.82
2010	211.44	223.81
2011	220.03	213.04

Very high prices and high coverages such as those imposed on Saturation Mail, in addition to being a constraint on usage, almost inevitably attract competition. This is discussed candidly by the Postal Service's Notice in this docket:

The marketplace for distribution of retail advertising circulars is dynamic and changing. **Private delivery alternatives** to the mail are becoming technologically more sophisticated, **offering prices substantially below the current prices of mail distribution**, and aggressively marketing their services to saturation mailers, newspapers, and retail advertisers. **Saturation mailers are increasingly looking to private delivery options**, and newspapers are extending their reach through Total Market Coverage and Sunday Select (distribution to non-subscribers) delivered via non-postal carriers. **This poses challenges to the Postal Service** in maintaining and growing its volumes, and increases the need to build **programs that are competitively priced** with a high value delivery service. [Notice, p. 3 (emphasis added).]

Although the Postal Service believes that its discussion of these issues provides a rationale in support of the Valassis NSA, it totally misses the mark. Rather than providing any *raison d'être* for the proffered NSA, it illustrates that published tariffs for existing volumes of Saturation Mail should be reduced because they are so high as to no longer be competitive.

The Postal Service elaborates on the above assertions in its response to ChIR No. 3, which further underscores this conclusion. For instance, the Postal Service states:

In addition to independent private delivery companies, newspapers continue to invest and own affiliated companies that have focused on all aspects of private

carrier delivery through the use of technology such as GPS, delivery routing software, and other computer-enabled devices, which better enable their capabilities to plan, track, monitor and measure results.... The combination of improved technology and **rapid migration to private delivery** has provided a capital surplus for these companies to invest in further technological advancements related to the delivery of advertising. These combined elements present a formidable threat to this class of mail and, in turn, Postal Service mail volume. [ChIR No. 3, Question 5.b (emphasis added).]

The “rapid **migration** to private delivery” (emphasis added) discussed by the Postal Service presumably is from some of its **existing** saturation mail — *i.e.*, it is not advertising for durable and semi-durable goods by national retail providers that is migrating because, according to the Postal Service’s rationale for this NSA, it has had little or no such advertising in Standard Mail that could be the subject of migration. Another response states that:

the Postal Service also reviewed numerous alternate delivery company, association, and industry websites. The review ... provided **many examples of the movement** of Total Market Coverage programs **from the mail** to their services. The Newspaper Association of America website ... includes the reference to a NAA commissioned study by Mather Economics entitled “**How Are USPS Rates** Affecting the Preprint Advertising Market?” which details the movement or planned movement of TMC programs to alternate delivery. [ChIR No. 3, Question No. 5.c(i) (emphasis added).]

Here again the Postal Service refers to movement of **existing** saturation mail volume being lured away by Total Market Coverage programs of newspapers on account of saturation rates that are so high as to be non-competitive. Yet the Valassis NSA restricts lower rates to a segment of advertisers that the Postal Service asserts do not use shared saturation mail. It should be obvious on its face that restrictions in the Valassis NSA will do nothing to stem the migration discussed and feared by the Postal Service. Finally, the Postal Service states:

private delivery companies, including those affiliated with newspapers, are more aggressively marketing this product [Total Market Coverage] to potential customers **across the full saturation advertising mail distribution spectrum.**

... In addition, the Postal Service is aware that a number of saturation shared mailers of various sizes have been approached by private delivery companies to switch out of mail delivery. Some mailers have recently shifted portions of their distribution to private delivery or are testing such distribution. Many mailers have told the Postal Service that they are considering such changes. [ChIR No. 3, Question 5.d (emphasis added).]

Yet again, the Postal Service acknowledges that prices for the full spectrum of Saturation Mail are too high, and it risks losing some, perhaps a substantial, portion of that existing high-profit volume.

E. The Valassis NSA Does Not Address, Hence Will Not Solve, Any of the Basic Problems Identified by the Postal Service.

Limiting price reductions in the NSA to hard-copy advertising that the Postal Service currently does not deliver totally fails to address in any way any private delivery alternatives. Yet the Postal Service acknowledges that those delivery alternatives have prices substantially below the current prices for existing saturation Mail, drawing away that mail volume. If the volume is not currently in the Postal Service, it cannot be drawn away from the Postal Service. And, certain types of mailers using Valassis excepted, nothing contained in this NSA is likely to deter saturation mailers from “increasingly looking to private delivery options.” Nor does this NSA do anything to help assure that any of the Postal Service’s existing highly profitable saturation products will be more competitively priced. In fact, the NSA seeks to wall off any price reduction for existing product users, no matter the extent to which volume of those products is migrating to private delivery.

To sum up, the Postal Service complains about private delivery companies competing for **existing** saturation mail volume, acknowledges that its rates for the full spectrum of segments within Saturation Mail are too high, and then proposes an NSA that restricts rate

reductions to a narrow segment of advertisers that purportedly **do not use the mail**. The Postal Service is thus seen to avoid every issue identified in its Notice and set out in its response to ChIR No. 3, while seeking to attract new revenues from businesses that do not currently distribute hard-copy advertising via the mail. The rationale for this NSA is totally deficient, a complete non-sequitur, providing no basis for approval by the Commission. The appropriate response is for the Postal Service to use its price-setting flexibility to reduce published tariffs for saturation mail in a manner calculated to protect its existing volume of saturation mail and, in the process, attract new volume.

Finally, the Postal Service asserts that it cannot lose money on any volume generated by the Valassis NSA. If true, it only would be so because Saturation Mail has a very high coverage, and price discounts of 20 to 25 percent still leave room for profit. But “no loss on this NSA” begs the point. By now the Postal Service and the Commission should have learned that NSAs are no cure-all for widespread problems, especially problems with the general tariff structure. NSAs should not be viewed as capable of rectifying any such underlying problems. When that is taken into account, this NSA actually presents a hidden danger. Although targeted price reductions in the NSA will do nothing to stem migration of existing high-profit saturation mail volume, with this NSA in place the Postal Service may complacently seek to maintain the existing price level for saturation mail, while watching substantial high-profit volume gradually migrate to private delivery. To the extent that such migration is preventable by relying on adjustments to the general tariff schedule, it would be appropriate for the Commission’s analysis to offset such losses against any profits expected to be derived from this NSA.

Figuratively speaking, approval of this NSA could reinforce the non-business-like thinking at the Postal Service, could encourage it in sticking its head in the sand, and even could be said to allow the Postal Service to “fiddle” with NSAs which do not address the problem “while Rome burns.” The Commission would do the Postal Service no favor by deferentially approving this NSA as it has done with respect to each of the collectively money-losing NSAs presented in the past. The Postal Service has stated in the past that it needs no pricing strategy, as all matters are committed to the sound discretion of the Governors. *See* Docket No. ACR2011, Valpak Initial Comments, pp. 24-26. Of course, this case was never expressly approved by the Governors, but the Governors would be aided by adopting some profit-oriented approach. Let this NSA be the occasion when the Commission forced the Postal Service to reassess its counterproductive pricing strategy, and embark on a business-like pricing approach that would enhance chances for the company’s survival.

CONCLUSION

For the reasons set out above, the proposed Valassis NSA should be rejected.

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